Supreme Court, U.S.
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No. 91-7358

In The

Supreme Court of the United States

October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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Question Presented

Whether, when considering violations of *Doyle v. Ohio* in federal habeas corpus proceedings, it is consistent with constitutional due process and the Sixth Amendment right to trial by jury to abandon the standard of review of whether constitutional error was harmless beyond a reasonable doubt and substitute the standard of whether the error substantially affected the course of the trial.

Parties to the Proceeding

The parties to the proceedings in the court below were Gordon A. Abrahamson, Superintendent Dodge Correctional Institution, and Todd A. Brecht.

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OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin is set out in 405 N.W.2d 718 (1987) a copy of which is contained in the Joint Appendix at 38.

The opinion of the Wisconsin Supreme Court is set out at 143 Wis.2d, 297, 421 N.W.2d 96 (1988), a copy of which is contained in the Joint Appendix at 50.

The opinion of the United States District Court for the Western District of Wisconsin is set out at 759 F.Supp. 500 (1991), a copy of which is contained in the Joint Appendix at 74.

The opinion of the United States Court of Appeals for the Seventh Circuit is set out at 944 F.2d 1363 (1991), a copy of which is contained in the Joint Appendix at 98.

The order of the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing with suggestion for rehearing en banc is contained in the Joint Appendix at 131, with the Petition for rehearing with suggestion for rehearing en banc contained in the Joint Appendix at 132.

The order of the Supreme Court of the United States granting certiorari limited to issue I of the Petition for Certiorari and leave to proceed in forma pauperis is contained in the Joint Appendix at 148.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing the grant to Petitioner of a writ of habeas corpus was filed on September 26, 1991 and appears in the Joint Appendix at 98.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc, contained in the Joint Appendix at 132, was denied by the United States Court of Appeals for the Seventh Circuit on November 20, 1991 which order appears in the Joint Appendix at 131.

The jurisdiction of this Court is conferred under 28 U.S.C. Section 1254 (1) and Rules 10(1)(a) and 10(1)(c) of this Court.

A petition for certiorari was duly filed in this Court, which petition was granted on June 8, 1992, which order is contained in the Joint Appendix at 148.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides in pertinent part: "No person shall be . . . deprived of life, liberty or property, without due process of law. . . . "

The United States Constitution, Amendment XIV provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . "

The United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . . "

The United States Constitution, Article I, Section 9, cl. 2 provides in pertinent part: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

Wisconsin Statutes Sections 940.01 and 940.08 (West, 1982) in pertinent part are as follows:

"940.01 – First-degree murder

1) Whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony.

2) In this chapter 'intent to kill' means the mental purpose to take the life of another human being."

"940.08. – Homicide by negligent use of vehicle or weapon

1) Whoever causes the death of another human being by a high degree of negligence in the operation or handling of a vehicle, firearm, airgun, knife or bow and arrow is guilty of a Class E felony.

2) A high degree of negligence is conduct which demonstrates ordinary negligence to a high degree, consisting of

an act which the person should realize creates a situation of unreasonable risk and high probability of death or great bodily harm to another."

STATEMENT OF FACTS

The facts are stated in the opinion below by the United States District Court for the Western District of Wisconsin at Jt. App. 75-87. For purposes of the issue in this case involving improper use of Defendant's silence after arrest, the prosecutor also made the following statements in closing argument:

> "This case is basically one of credibility." Jt. App. 29.
>
> "He sits back here and sees all our evidence go in and then comes out with this crazy story . . . " Jt. App. 31.
>
> "[T]he only truthful thing he said this entire week is that he's a lier. (sic)" Jt. App. 32.
>
> "Now he's with Officer Papke and he tells him nothing. . . . " Jt. App. 33.
>
> "That's the sort of guy Todd Brecht is. He always wants to talk to somebody, until the opportunity presents itself." Jt. App. 33.
>
> (Final closing argument)
>
> "First of all there has not been a single piece of independent evidence received to corroborate anything Todd Brecht said from that witness stand. It is his cockamamie story that he wants you to believe and which is carefully woven as I said before, to fit in with all the State's evidence." Jt. App. 35.
>
> "There is no other evidence other than his story as part of the defense, nothing." Jt. App. 36.
>
> "He said he wanted to talk to the detectives. Well Polus and Papke weren't good enough. Seven guys on the Buffalo County Sheriff's Department, two of them are there with a warrant and does he say anything? Mr. Ridgways said, 'what would you say?' I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what

happened,' but he didn't say that did he. No, he waited until he hears our story." Jt. App. 36
"Why didn't he tell the Police about it being an accident." Jt. App. 37

SUMMARY OF ARGUMENT

The harmless error standard articulated by the court in *Chapman v. California* has deep roots in the American legal system. The standard has been applied in all federal and state jurisdictions to protect the ancient right to a trial by jury. This court, as well as all of the United States Courts of Appeals for the various circuits have understood the *Chapman* standard to be applicable on habeas. Review of congressional debates over the last quarter of a century confirms that at various times Congress has considered the standard, failed to change it, and in effect ratified the standard. Most recent considerations by Congress of this court's decision in *Arizona v. Fulminante* confirm Congressional understanding that the harmless error standard is the bedrock of constitutional protection, including the sixth Amendment right to a jury trial.

Examination of the historical understanding of the meaning of a jury trial both in English and American legal history, confirms the deep roots protecting the jury right. Those roots include deference to the jury for determining facts, and drawing inferences from those facts as well as application of law. Recent psychological research confirms the ephemeral nature of any post hoc attempt to peer deeply into any specific constitutional error's impact upon complex decisionmaking.

This court should continue the harmless error standard on collateral review of state convictions, to evidence the importance of the writ of habeas corpus, to maintain parallel structure with the test available for state convictions on direct review. Continuance will maximize the deterrent impact against prosecutors who may be tempted to shade constitutional guarantees. It would continue as well the historic constitutional and statutory understanding that the federal courts are the ultimate guarantors of federal constitutional rights. The new standard suggested by the judgment under review may increase the burden upon lower federal courts in habeas

cases, and certainly would encourage state judges, prosecutors and police to commit constitutional wrongs against citizens.

In the particular case, the constitutional violation pierces to the heart of the jury fact finding process, directly into the evaluation of multiple inferences from undisputed facts. Constitutional error such as the ones at bar have direct impact on the truth finding functions of the jury. Not only do such errors introduce insoluble ambiguity and uncertainty into the criminal trials, with routine impairment of the jury's truth finding function, but they also did so in the case at bar.

ARGUMENT

In this case the only contested issue is whether the death resulted from an intent to kill or a tragic accident. The American legal system assigns the power and duty to determine that intent to a jury, and not to a reviewing court. Once a reviewing court has determined that error is both constitutional error and error that cannot be denominated "harmless," retrial is required.

Since the error in Mr. Brecht's case is so central to the prosecution's theory of the case, the writ of habeas corpus should issue. It is suggested that the original understanding of "harmless error," which may not be all that different from material error, error that may have affected the jury verdict or impacted upon the jury deliberation, should apply. The original grant of the writ of habeas corpus by the United States District Court for the Western District of Wisconsin should be reinstated.

I. THE HARMLESS ERROR STANDARD IN AMERICAN LAW

The harmless error standard became deeply ingrained in American jurisprudence this century. All 50 states, the District of Columbia and Guam, have adopted and apply the constitutional harmless error standard of *Chapman v. California*.[1] Indeed, both state and federal courts frequently apply

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[1] See, *Ex Parte Wilson*, 571 So. 2d 1251, 1265 (Ala. 1990); *LaVigne v. State*, 812 P.2d 217, 220 (Alaska 1991); *State v. Fulminante*, 778 P.2d 602, 610,

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some variety of harmless error standard (not always involving alleged constitutional error).[2]

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629 (Ariz. 1989), reversed by *Fulminante v. Arizona*, ___ U.S. ___, 111 S.Ct. 1246, 113 L.Ed. 302 (1991) (reinstating harmless error standard in original opinion of June 16, 1988); *Logan v. State*, 773 S.W.2d 413, 415-16 (Ark.1989); *People v. Clair*, 828 P.2d 705, 729 n.10 (Cal. 1992); *Bartley v. People*, 817 P.2d 1029, 1033 (Colo. 1991); *State v. Walker*, 537 A.2d 1021, 1028 (Conn. 1988); *Van Ness v. U.S.*, 568 A.2d 1079, 1089 (D.C. App. 1990); *Alston v. State of Delaware*, 554 A.2d 304, 309 (Del.Supr.1989); *Florida v. Delva*, 575 So. 2d 643, 649 (Fla. 1991); *Zant v. Beck*, 386 S.E.2d 349, 350 (Ga. 1989) (On State habeas); *People of Territory of Guam v. Viloria*, 1991 WL 255858 (D.Guam App. Div. 1991); *State v. Lincoln*, 825 P.2d 64, 71 (Haw. 1992); *State v. Fain*, 809 P.2d 1149, 1152 (Idaho 1991); *People v. Simms*, 520 N.E.2d 308, 315-6 (Ill. 1988) (use in sentencing phase of capital punishment case questioned); *Morgan v. State*, 469 N.W.2d 419, 427 (Iowa 1991); *Reid v. State*, 529 N.E.2d 1309 (Ind. 1988); *Paenitz v. Commonwealth*, 820 S.W.2d 480, 481-2 (Ky. 1991); *State v. Getz*, 830 P.2d 5, 11 (Kan. 1992); *State v. Sullivan*, 596 So. 2d 177, 184-85 (La. 1992); *State v. Watson*, 580 A.2d 1067, 1072 (Md. 1990); *State v. Ingalls*, 544 A.2d 1272, 1275-6 (Me. 1988); *Commonwealth v. Doherty*, 578 N.E.2d 411, 416 (Mass. 1991); *People v. Banks*, 475 N.W.2d 769, 778-79 (Mich. 1991); *State v. Naylor*, 474 N.W.2d 314 (Minn. 1991); *Clemons v. State*, 593 So.2d 1004, 1006-7 (Miss. 1992); *State v. Kilgore*, 771 S.W.2d 57, 62 (Mo. banc 1989); *Brodniak v. State*, 779 P.2d 71, 73-74 (Mont. 1989); *State v. Timmerman*, 480 N.W.2d 411, 420 (Neb. 1992); *Redmen v. State*, 828 P.2d 395, 400 (Nev. 1992); *State v. Williams*, 581 A.2d 78, 80-81 (N.H. 1990) (per curiam); *State v. Marshall*, 586 A.2d 85, 147-49 (N.J. 1991); *State v. Jett*, 805 P.2d 78, 81 (N.M. 1991); *People v. Hamlin*, 525 N.E.2d 719, 721 (N.Y. 1988); *State v. Huff*, 381 S.E.2d 635, 653-54 (N.C. 1989); *State v. Kelley*, 450 N.W.2d 729, 732 (N.D. 1990); *State v. Jenks*, 574 N.E.2d 492, 509 (Ohio 1991); *Walker v. State*, 795 P.2d 1064, 1069 (Okl. Cr. 1990); *State v. Williams*, 828 P.2d 1006, 1011-12, 1019, n. 17, (dissent) 1026 et seq. and 1030 (Or. 1992); *Commonwealth v. Lewis*, 598 A.2d 975, 980-81 (Pa. 1991); *State v. Fayerweather*, 540 A.2d 353, 354 (R.I. 1988); *State v. Simmons*, 417 S.E.2d 92, 94 (S.C. 1992); *Satter v. Solem*, 458 N.W.2d 762, 769-770 (S.D. 1990) (state habeas); *State v. Neal*, 810 S.W.2d 131, 138-39 (Tenn. 1991); *Cook v. State*, 821 S.W.2d 600, 603, 605-8 (Tex. Cr. App. 1991); *State v. Johnson*, 823 P.2d 484, 488 (Utah 1991); *Goins v. Commonwealth*, 237 S.E.2d 136, 138 (Va. 1977); *In Re Fisher*, 594 A.2d 889, 896 (Vt. 1991); *State v. Scott*, 757 P.2d 492, 495 (Wash. 1988); *State v. England*, 376 S.E.2d 548, 555 (W.Va. 1988); *State v. Webb*, 468 N.W.2d 694, 695-7 (Wis. 1991) (Per Curiam); *Campbell v. State*, 589 P.2d 358, 367 (Wyo. 1979).

[2] As of July 17, 1992, Westlaw contained discussion of harmless error in 36,161 documents on the Allstates or Allstates-Old databases, and 9,910 documents on the Allfeds or Allfeds-Old databases. The comparable Lexis databases

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The judicial use of the term harmless error is largely confined to the twentieth century. For example, only 92 reported federal cases on Westlaw prior to 1900 employ the term, and in most cases the term was used only by the headnote writer.[3]

None of these 19th century federal cases was concerned with "harmless error" in the context of constitutional error. Ordinarily the 1890s use of the term was in the context of "material" error; see headnote to *Reed v. Stapp*, 52 F. 641 (7th Cir. 1892).[4]

A. Congressional Enactment of the First Harmless Error Standard Evidenced Concern About Improper Interference with Jury Functions.

Shortly after headnote writers popularized the term "harmless error" Congress began debating the concept starting in 1911 and in 1919 enacted the first federal "harmless error" standard. The debate demonstrated the difficulties attendant upon attempts to reallocate decision power from the

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include 38,486 state documents and 11,719 federal documents. [State Omni and Genfed-Omni]

[3] The 12 exceptions (all but one in the 1890s) are: *Western Ins. Co. v. Goody Friends*, 29 Fed. Cas. 764 (S.D. Ohio 1861); *Jones v. Allen*, 85 F. 523 (8th Cir. 1898); *Dun v. Maier*, 82 F. 169 (5th Cir. 1897); *Coloritype Co. v. Williams*, 78 F. 450 (1897); *Iowa State Traveling Men's Ass'n v. Moore*, 73 F. 750 (7th Cir. 1896); *Delaware, L. & W.R. Co. v. Roalefs*, 70 F. 21 (3rd Cir. 1895); *St. Louis, I.M. & S. Ry. Co. v. Phillips*, 66 F. 35 (8th Cir. 1895); *Chicago, R.I. & P. Ry. Co. v. Caulfield*, 63 F. 396 (8th Cir. 1894); *MacDonald v. U.S.*, 63 F. 426 (7th Cir. 1894); *Bracken v. Union Pac. Ry. Co.*, 56 F. 447 (8th Cir. 1893); *Kellogg v. Clyne*, 54 F. 696 (8th Cir. 1893); *Croxby Lumber Co. v. Smith*, 51 F. 63 (3rd Cir. 1892).

[4] The headnote reads: "Review on Appeal – Harmless Error. Where there is a special finding of facts to support the judgment the admission of immaterial evidence, not affecting such findings, is harmless error." The court stated: "These facts are sufficient to bar a recovery. The admission of immaterial evidence not affecting that finding could not, therefore, injure the plaintiff, and constitutes no ground for reversal . . . . " (52 F. 645). A similar pattern of use exists in the state courts. Although there were 659 state cases which used the term "harmless error" prior to 1900, in most of these cases the term was used only by the headnote writer. For examples see, *Hobbs v. People*, 55 N.E. 692 (Ill. 1899); *People v. Garcia*, 59 P. 576 (Cal. 1899); *State v. Leieume*, 26 So. 992 (La. 1899).

jury to the court as well as the close constitutional ramifications upon the jury trial right.

The first draft language was attributed to a commencement speech by President Taft[5] (before his election).[6] The context of the harmless error proposal was an assumption that the most miniscule or technical errors required the reversal of a conviction.[7]

In 1912 Congress continued its discussion of the 1911 harmless error proposal conjoined with a proposal providing for special verdicts in civil cases.[8]

An intense and instructive debate resulted about the relationship of the court and jury. Senator Heyburn of Idaho,

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[5] "The Administration of Criminal Law," 15 Yale Law Journal 1 (1905). The speech considered the comparative advantages of civil law and common law in establishing legal systems for Puerto Rico and the Philippines under their new "American sovereignty!" It was by no means a clear proposal to change "American law."

[6] House Report 1949, 61st Congress, 3d Session (1911) (To accompany H.R. 31165). Earlier President Taft had lauded the common law writ of *habeas corpus*, praising the "practical remedy of the writ" as "but one of many instances in which our Anglo-Saxon ancestors hammered out their civil liberty by securing from their would-be royal oppressors not general declarations of principles of freedom like a French constitution, but distinct and definite promises that certain rules, not of substantive, but of adjective law should obtain. To them it was the securing of the means by which they could themselves secure their liberty,. . . . " 15 Yale Law Journal 3.

[7] House Report No. 1949 cited as an example of a technical error the reversal of a conviction because the indictment did not read "against the peace and dignity of the State," but omitted the word "the" so the indictment read "against the peace and dignity of State." House Report 1949, 61st Congress, 3d Session, p. 2 (1911). The decision cited for this hypertechnical error was *State v. Campbell*, 109 S.W. 706 (Mo. 1908). The Missouri Supreme Court first seriously considered whether the error was "harmless," but rejected the conclusion.

[8] The text under discussion provided: "No judgment, decree or order shall be set aside or reversed . . . on account of any error which does not injuriously affect the substantial rights of the party complaining. . . . " The text went on to permit a trial judge to submit specific issues of fact to the jury and gave power to that judge and any court on writ of error to enter a judgment either on the verdict or upon the special findings, if conclusive. The special findings language differed substantially from the current, limited power given federal judges regarding special interrogatories contained in Rule 49 (b), Federal Rules of Civil Procedure.

vigorously opposed the bill in debate with Senators Sutherland, Borah, and Root (inter alia). Senator Heyburn's primary objection was to the special verdict language, but he raised doubt about the "injurious impact upon substantial rights" section as well, which he saw as raising difficulties parallel to determinations of whether errors are *material* errors. Congressional Record – Senate, 11774, August 24, 1912, 62nd Congress, 2nd Session.[9]

Senator Heyburn cautioned about uncontrolled discretion in any person, judges included. He cautioned against hasty action on the assumption that one knows the correct application of law to a particular situation. Senator Heyburn stated:

> "but I have had to stand in a miner's meeting where there was no law within reach and to perform the same duty, keep the curb upon the impulses of men to disregard established methods and principles of justice. I have seen them rush forward to seize a man's property because of what they thought the law should be, or to take his life because of what they thought the law should be." Congressional Record – Senate 11774-5, August 24, 1912, 62nd Congress, 2nd Session.

Senator Heyburn saw the proposal as [obnoxious] interfering with the right to trial by jury:

> "The right of trial by jury means a verdict by the jury. The only possible conclusion of a jury trial is a verdict by the jury, and this proposes to substitute for that, at the option of the judge – which adds to

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[9] The language "material error" was the closest language used to "harmless error" by the Supreme Court during the 19th century, appearing first in Chief Justice Taney's opinion for the court in *Dred Scott v. Sandford*, 60 U.S. 393 at 428 (1856) ("or any other material error. . . . any material error or errors . . . . and correcting other material errors. . . . "). The phrase was next used in 1875 in *Hall v. Weare*, 92 U.S. 728 at 731 (1875) ("Nor was there any material error in the admission of evidence"), and repeated several other times that decade. See, *Stewart v. Salamon*, 97 U.S. 361 at 364, (1878), *Grand Trunk Ry of Canaday v. Stevens*, 95 U.S. 655 at 659 (1877), and *The Stephen Morgan*, 94 U.S. 599 at 603 (1876). See n. 13 below.

the objection – a finding of facts upon which the judge shall render the verdict."

* * *

"The finding of facts is not trial by jury, any more than is listening to the arguments of counsel, or any more than is listening to the charge of the judge. The trial by jury is summed up in the verdict of the jury. Nothing is trial by jury except the verdict of the jury. That which precedes is only the process of trial, but the thing referred to in the Constitution of the United States is not the process or the progress of the trial; it is the verdict of the jury." Congressional Record – Senate 11775-11776, August 24, 1912, 62nd Congress, 2nd Session.[10]

The term "harmless error" may have first appeared in Congress's parlance through House Report 611, 62nd Congress, 2d Session, p. 2 (1912). See legislative history traced in fn. 11, *Kotteakos v. United States*, 328 U.S. 750, 759, 66 S.Ct. 1239, 1245 (1946).

Similar language was contained in House Report 913, 65th Congress, 3d Session, p. 2., and was repeated with similar referents in reports to congress in 1915 and 1916.[11] Each House Report cited *Railroad Company v. O'Reilly*, 158 U.S. 334 (1895), and *Cunningham v. Springer*, 204 U.S. 647 (1907) and stated:

"In other words, in the first of these cases the Supreme Court holds that an error is presumed to be prejudicial until the contrary appears, and in the second that an error is presumed to be harmless

[10] Senator Heyburn further remarked, "there seems to have grown up in this country, among some people and in some sections and under some interests, the fear of jury trial. I have heard men occupying judicial position speak lightly of jury trials. Perhaps in the vanity of their minds they felt that all matters affecting human kind should be vested in them for determination." Congressional Record – Senate 11777, August 24, 1912, 62nd Congress, 2nd Session.

[11] These include a report by Representative Webb, Chairperson of the House Judiciary Committee, House Report 1218, 63d Congress, 3d Session, (1915), extracts reprinted in House Report 264, 64th Congress, 1st Session (to Accompany H.R. 9428) February 26, 1916.

until the contrary is made to appear. It is the purpose of the first section of the present bill to enact . . . . that in the consideration in an appellate court . . . judgment shall be entered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party." House Report 264, pp. 2-3.[12]

This description of both decisions not only misdescribes both decisions, but also is quite incorrect in its reference to harmless error. No opinion by the Supreme Court employed the term "harmless error" in the "modern" sense until Justice VanDevanter's opinion in *Meeker v. Lehigh Valley Railroad Company*, 236 U.S. 434, at 439 (1915) although the term was frequently used in headnotes to Supreme Court decisions earlier.[13]

Congress reconsidered the "harmless error" language of the 1911 and 1912 bills in 1917 [See, Congressional Record –

[12] As a practical matter, this description of both holdings is inaccurate. In *Railroad Company v. O'Reilly* the court held certain hearsay evidence would not have alone caused a reversal since it was "immaterial" 158 U.S. 337, however, other improperly admitted evidence was "so serious as to compel a reversal" 158 U.S. 335-6. In *Cunningham v. Springer* the court was unable to conclude that any error existed, but on the assumption that certain testimony was error, considered it became "immaterial" 204 U.S. 655. Neither case articulated a presumption similar to those represented in the Congressional reports.

[13] Such as in relation to *Cunningham v. Springer*, 204 U.S. 647 (1907), and was mentioned by Justice Peckham for the Court while describing a state case, *Hale v. Allinson*, 188 U.S. 56, 61 (1903). During the 1870s several justices described certain errors as harmless: Mr. Justice Hunt in three cases: *Transportation Line v. Hope*, 95 U.S. 297, 303 (1877) ("If there was an error in this respect, it was quite harmless."); *Railroad Co. v. Pratt*, 89 U.S. 123, 135 (1874) ("The error was, however, harmless."); *Chambers County v. Clews*, 88 U.S. 317, 321 (1874) ("While we think there was error in the judgment upon this plea, it seems to have been a harmless one."); and Mr. Justice Strong in *Lucas v. Brooks*, 85 U.S. 436, 454 (1873) ("The error of the court, therefore, if there was an error, was perfectly harmless. . . . "). See also *Thaw v. Falls*, 136 U.S. 519, 547-48 (1890) ("harmless and inoperative error").

Senate, 11586 November 18, 1917, 65th Congress, 1st Session] and also in 1919. [Congressional Record – House, 3605 February 17, 1919, 66th Congress, 1st Session]. Each of these bills provided that judgments be affirmed as long as technical errors, defenses or exceptions do not affect the *substantial rights* of the parties.

The first federal "harmless error" law, Act of February 26, 1919, ch. 48, 40 Stat. 1181, stated:

> "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defenses, or exceptions which do not affect the substantial rights of the parties." [Compare, Rule 61, Federal Rules of Civil Procedure, Harmless Error].

B. Examination of the Original Understanding of Harmless Error Both by Congress and by Federal Courts Suggests that the Harmless Error Concept was Quite Comparable to Material Error.

As suggested above, the references by the headnote writers to case reports for both federal and state courts, as well as the discussion on the floor of Congress, frequently occur in the context of the term material error. See supra footnotes 4, 9, 12 and accompanying text. Senator Heyburn explicitly stated the concepts were parallel and presented similar difficulties. The historical sense of material error or "affect the substantial rights of a party" does not appear to have been outcome dependent. The historical sense is more correctly stated as "impact." The first harmless error statute

spoke of affecting substantial rights, not of affecting or reversing the outcome.[14]

C. Concern with Improper Judicial Invasion of Jury Functions has a Venerable History as Bushell's Case Illustrates.

Concern with jury prerogatives is firmly embedded in the history of habeas corpus. *Bushell's Case*, 124 Eng. Rep. 1006, Vaughn, 135 (en banc, C.P. 1670) is an excellent illustration of the use of the writ to secure fundamental liberty and protect such prerogatives.[15] *Bushell's Case* involved the liberty of four jurors who acquitted William Penn, the founder of Pennsylvania, despite judicial direction to convict. Penn had been accused of unlawful assemblies and contempts (by preaching the gospel in Grace Church Street, although nobody testified as to what Penn had said). The case was likely well known to the lawyers who drafted the United States Constitution in Philadelphia.[16] Lord Chief Justice Hale described *Bushell's Case*:

> "But it was agreed by all the judges of England (and only one dissenting) that this fine was not legally set upon the jury, for they are judges of matters of fact; and although it was inserted in the fine that it was 'contra directionem curiae in materia legis,' this mended not the matter, for it was impossible any matter of law could come in question till the matter of fact were settled and stated, and agreed by

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[14] The sense of Mr. Justice Trible's use of the word harmless in *Ellott et al. v. Peirsol et al.*, 26 U.S. 328, at 337 (1828) is most analogous: "[I]t will appear that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were therefore, harmless."

[15] Justice Cardozo described this case as "born of the fear of the Star Chamber." *Clark v. U.S.*, 289 U.S. 1, 17 (1933)

[16] *Commonwealth v. Contakos*, 453 A.2d 578, 580-82 (Pa. 1982) describes the facts surrounding *Bushell's Case*. *Bushell's Case* was cited to the United States Supreme Court in *Ex Parte Bollman*, 4 Cranch 75, 8 U.S. 75 (1807), and commented upon by Loard Chief Justice Hale whose comments were subsequently discussed by Blackstone, *Commentaries on the Laws of England*, vol 4. p. 361, vol 3 at 374-75.

the jury; and of such matter of fact they were the only competent judges. And although the witnesses might per chance, swear the fact, to the satisfaction of the court, yet the jury are judges, as well of the credibility of the witnesses, as of the truth of the fact, for possibly they might know somewhat, of their own knowledge, that what was sworn was untrue; and possibly they might know the witnesses to be such as they could not believe; and it is the conscience of the jury that must pronounce the prisoner guilty, or not guilty. And to say the truth, it were the most unhappy case, that could be, to the judge, if he, at his peril, must taken upon him the guilt or innocence of the prisoner; and if the judge's opinion must rule the matter of fact, the trial by jury would be useless." 22 Fed. Cas. 1322, 1329-30.[17]

Lord Mansfield paraphrased *Bushell's Case*:[18]

"The fundamental definition of trial by jury, depends upon a universal maximum that is without exception: 'Ad quaestionem juries non respondent juratores; ad questionem facti, non respondent judices,' literally taken is true: if it be demanded, 'what is the fact?' the judge cannot answer; if be asked, 'what is the law in the case' the jury cannot answer it."

Chief Justice Vaughn expressed two separate difficulties with the attempt to compel a jury verdict in *Bushell's Case*. The first difficulty relates to knowing facts; the second relates to what one concludes or infers from such facts.

i) Fact Determination

Chief Justice Vaughn identified nine problems with the judge taking over the function of fact determination traditionally

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[17] Chief Judge Cranch asserted, however, that *Blackstone*, "materially altered the language of the last clause of the last sentence. Blackstone says, '. . . . for if the judge's opinion must rule the verdict the trial by jury would be useless.' " *Stettinius v. U.S.*, 22 Fed. Cas. 1322, 1330 (Cir. Ct. D. C. 1839)

[18] While delivering the opinion in *Rex v. Shipley (Case of Dean of St. Asaph)*, 21 Howell State Trials 847, 1 Ersk. 211, 217 (K.B. 1784).

assigned to the jury. *Bushell's Case*, 124 Eng. Rep. 1012-13. They include:

> "But the evidence which the jury have of the fact is much other than that; for,
>
> 1. Being return'd of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in Court, but to this evidence the Judge is a stranger.
>
> 2. They may have evidence from their own personal knowledge, but which they may be assur'd, and sometimes are, that what is depos'd in Court, is absolutely false; but to this the Judge is a stranger, and he knows no more of the fact than he hath learn'd in Court, and perhaps by false depositions, and consequently knows nothing.
>
> 3. The jury may know the witnesses to be stigmatiz'd and infamous, which may be unknown to the parties, and consequently to the Court.
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> * * *
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> 7. To what end is the jury to be retorn'd out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general? To what end are they challeng'd so scrupulously to the array and pole? To what end must they have such a certain free-hold, and be probi & legales homines, and not of affinity with the parties concern'd? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge:
>
> * * *

9. It is absurd a jury should be fined by the Judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence in Court of either side, so if the jury find, upon their own knowledge, as the course is if the defendant plead solvit ad diem, to a bond prov'd, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea.

And it is as absurd to fine a jury for finding against their evidence, when the Judge knows but part of it: for the better and greater part of the evidence may be wholly unknown to him; and this may happen in most cases, and often doth, as in *Graves and Shorts case.*"

While the nature of the jury has changed in detail over the last three centuries (C.J. Vaughn's point 1 above), many of these concerns remain valid today. Only the collective jury is likely to have sufficient knowledge of the vicinage against which it can test many witnesses' statements.

For example, in the instant case, a reviewing court is quite unable to fully appreciate Mr. Brecht's explanation that his flight in panic to his parents' house was by the most direct route, a route through a corner of the state of Minnesota. Even a local judge might not be sufficiently familiar with the traffic patterns of the area to evaluate such testimony. While such general community knowledge may be quite different from knowledge assumed to be within the earliest juries' ken,[19] such knowledge remains an important value in all trials.

Conversely, the ability of the Seventh Circuit to understand the complex and confusing testimony about the interrelationship of the rooms in the house where the shooting took place is doubtful, particularly since the record on appeal was devoid of any diagram of the house either outside or

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[19] Holdsworth states that during the latter part of the 17th century the jury lost their character as witnesses. Holdsworth, 1 History of English Law, pp. 316-19 (7th ed. Rev., 1956).

inside. (See Jt. App. 138-139) Scant ability exists based upon the cold record to appreciate arguments revolving around the period during which Mr. Hartmann disappeared after being shot. (See Jt. App. 141, re phone off hook)

ii) Inferences From Facts.

Chief Justice Vaughn was, however, also concerned about inferences from raw facts. He stated:

"I would know whether any thing be more common, than for two men students, barristers, or Judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should inferr distinct conclusions from the same testimony: Is any thing more known than that the same author, and place in that author, if forcibly urg'd to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenents? How then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing: must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the Judge and jury." 124 Eng. Rep. 1009.

Chief Justice Vaughn was speaking of the judge and jury, both of whom, at least had seen and heard the witnesses in open court. He believed they could differ in conclusion. In the case at bar no reviewing court, state or federal, has had such an opportunity, and thus there is even more opportunity for difference in appreciation of the testimony and inferences from testimony in this case.

Chief Justice Vaughn further wrote:

"A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or inferr the thing to be resolv'd by anothers understanding

> or reasoning; and though the verdict be right the jury give, yet they being not assur'd it is so from their own understanding, are forsworn, at least in foro conscientiae." *Bushell's Case* 124 Eng. Rep. at 1013.

To invade the province of the jury is virtually to abolish the jury system. As Chief Justice Vaughn stated:

> "For if the Judge, from the evidence, shall by his own judgment first resolve upon any tryal what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue tryals by them at all?
>
> But if the jury be not oblig'd in all tryals to follow such directions, if given, but only in some sort of tryals (as for instance, in tryals for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal tryals, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil tryals." *Bushell's Case*, 124 Eng. Rep. 1010

The impact on the jury of nonharmless error can only be determined by speculation that directly invades the province of the jury.

II. CONGRESSIONAL CONSIDERATION OF HABEAS CORPUS SINCE CHAPMAN V. CALIFORNIA

Since the decision in *Chapman v. California,* Congress has considered changing the standard of review in habeas of state convictions under section 2254 a number of times. Thus the argument in part III C of the Seventh Circuit's opinion is not well taken. Jt. App. at 123. However, Congress has not enacted legislation to change the *Chapman* standard reflecting a congressional consensus *Chapman* is appropriate. Indeed, all legislative attempts of the last quarter of a century to limit the "harmless error standard" or curtail federal review under 28 U.S.C. section 2254 have failed.

A. The 1968 Attempt to Curtail Habeas Jurisdiction in Miranda Cases

In 1968, the year following *Chapman,* while speaking in opposition to Title II of the Omnibus Crime Control and Safe Streets Act of 1968, S. 917, Senator Tydings delivered a lengthy eulogy to the importance of the writ of habeas corpus in Anglo-American jurisprudence.[20] Senator Tydings attacked proposed language that would "abolish habeas corpus review in any Federal court of a State criminal conviction." He described, "This aspect of Title II [as] . . . an affront to both our Constitution and our history. This provision is clearly unconstitutional. It is nothing short of a blatant suspension of the writ of habeas corpus, against the clear command of the Constitution."[21]

That attempt to curtail federal habeas corpus jurisdiction failed.

B. The 1972 & 1973 Attempts to Modify Habeas by Requiring Proof of Substantial Deprivation and Demonstration of Probable Different Result

In 1972, another effort was made to alter the harmless error standard. In connection with the proposals, Richard G. Kleindienst, Attorney General of the United States, wrote the House Judiciary Committee generally supporting H.R. 13722, a proposal to modify the harmless error standard of *Chapman v. California,* Congressional Record – Senate, 24939 (July 24, 1972), 92nd Congress, 2nd Session. This proposal (contained

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[20] See inter alia Congressional Record – Senate 12827-12836, May 10, 1968, and Congressional Record – Senate 13990 – 14003, May 20, 1968, 90th Congress, 2nd Session.

[21] Congressional Record Senate, 12829, May 10, 1968, 90th Congress, 2nd Session. The language contained in S.Rep. 90-1097, Section 702(a) (proposed Section 2256, *Procedures in Obtaining Writs of Habeas Corpus*). Section 2256 would have defacto eliminated federal court habeas corpus jurisdiction over State convictions. (Section 2256 of committee print, Title II, Section 702(a), of the Omnibus Crime Control and Safe Streets Act of 1967, S.Rep. 90-1097, p. 10, (1968))

in S. 3833, text at Congressional Record Senate 22936) would have required proof of a "substantial deprivation" of constitutional rights and required the petitioner to show that a "different result would probably have obtained if such constitutional violation had not occurred." (at 24939) However, Attorney General Kleindienst supported removal from the bill of language that would have required "substantial doubt of the guilt of the applicant" because such consideration would introduce into habeas corpus a concept which should not be a focus of inquiry. (*Id.*) He wrote, "The basic fairness of the procedures used to convict the defendant without reference to his guilt or innocence, should remain the primary focus of Federal habeas corpus." (*Id.*)[22]

The proposed changes to Federal habeas corpus were not enacted.

C. The 1976 and 1977 Attempts to Overturn *Stone v. Powell*

In 1976 and 1977 attempts were made to overturn the holdings of *Stone v. Powell*, 428 U.S. 465 (1976) and *Francis v. Henderson*, 425 U.S. 536 (1976). See, Congressional Record – Senate, 11338, April 20, 1977, 95th Congress, 1st Session. Senator Nelson spoke at length against the proposal.[23] The proposed legislation once again failed.

D. The 1983 and 1984 Attempts to Curtail Habeas Corpus

In 1983, Senator Thurmond supported a proposed bill entitled "Finality of Criminal Judgments Act" that would have amended 2254 by adding a new subsection:

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[22] That legislative effort continued in the next Congress. See Congressional Record – Senate 2220, January 26, 1973, 93rd Congress, 1st Session. Attorney General Kleindienst in a letter to the House Judiciary Committee explicitly described the draft legislation as a modification of the harmless error standard of *Chapman v. California*, Congressional Record – Senate, 2225, January 26, 1973, 93rd. Congress, 1st Session.

[23] See also statement by Senator Mathias (at 11343), the Congressional Research Service (at 11344), and a student authored piece (at 11348).

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings." Congressional Record, S 402, January 27, 1983, 98th Congress, 1st Session.

Accompanying Senator Thurmond's remarks was an article by Jim Smith, then Attorney General of the State of Florida (S 403-407). Nowhere was the harmless error standard itself criticized by either Jim Smith or Senator Thurmond.

Mr. Smith stated, "*Congress* is the appropriate body to define the limits of federal habeas corpus review of state court judgments." S. 406.

The proposed legislation was again not adopted.

Senator Thurmond supported similar legislation in 1984. This proposal contained language described as preserving the state conviction unless the federal court found "a significant error or deficiency in the State proceedings. A mere reasonable difference of opinion in a case in which the proper disposition is unclear should not be grounds for disturbing a State judgment in a habeas corpus proceeding." Congressional Record, S. 979, Feb. 6, 1984, 98th Congress, 2nd Session.[24]

The proposal drew substantial opposition, including that of Senator Levin, who stated:

> "If a court declares that a State court was reasonable but was wrong, we are going to find people being executed although their constitutional rights were violated. I hope my friend from Florida is right – I think he very well may be – that the Federal courts are going to work that word 'reasonable,' the way they now work the habeas corpus process. I hope he is right. I know he hopes he is

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[24] This proposal was supported by a letter from Robert McConnell, Assistant Attorney General, at Congressional Record – Senate, S. 988, Feb. 6, 1984, 98th Congress 2nd Session. See also Congressional Record, H 11685, 11740-41, Nov. 26, 1991, 102nd Congress, 1st Session., and Conference Report, Violent Crime Control and Law Enforcement Act of 1991, HR 102-405, 102nd Congress, 2nd Session.

> [not] (sic?) wrong on this but I hope he is right. I think my fears will turn out to be very well justified.
>
> I hope we do not pass this bill, because I do not think we should be writing laws that are that vague that affect constitutional rights. . . . " Congressional Record, S. 991, February 6, 1984, 98th Congress, 2nd Session.

Senator Levin argued that between 1976 and 1984, three quarters of the capital cases decided by Federal Courts of Appeals *on the merits* were decided in favor of death sentenced individuals. "These very compelling statistics show the critical importance of habeas corpus being available in Federal courts to correct errors in capital cases committed in State courts." Congressional Record, S. 991, Feb. 6, 1984, 98th Congress, 2nd Session.

Once again, the legislation did not pass.

E. Attempts in 1991 and 1992 to Overturn *Arizona v. Fulminante*

The next major consideration by Congress of the standard of review in habeas corpus cases occurred in 1991-92 in the context of a proposal to overturn this court's decision in *Arizona v. Fulminante*, ___ U.S. ___, 113 L.Ed. 2d 302 (1991). The proposal regarding "Coerced Confessions" reads:

> "The admission into evidence of a coerced confession shall not be considered harmless error. For the purposes of this section, a confession is coerced if it is elicited in violation of the fifth or fourteenth articles of amendment to the Constitution of the United States." Congressional Record, H. 7923, Oct. 16, 1991, 102nd Congress, 1st Session.

This legislative attempt to reverse *Arizona v. Fulminante* drew a threatened veto by President Bush, as well as the opposition of 32 state Attorneys' Generals and other law enforcement officers. Congressional Record, H. 11679, November 26, 1991, 102nd Congress, 1st Session.

What is most impressive during all discussion of the attempt to overturn this court's *Arizona v. Fulminante* decision, is the apparent universal acceptance of the harmless

error standard as an assumed basis for argument, and the lack of criticism of that standard. For example a letter from the U.S. Attorney, District of Arizona, Ms. Linda A. Akers, accepted the propriety of "normal harmless error standards" as did Representative Jon Kyle who cited the letter while he spoke against reversing *Arizona v. Fulminante*. Congressional Record, H. 7902, October 16, 1991 102nd Congress, 1st Session. Both Ms. Akers and Representatives Kyle find that, "There is no rational reason why a different rule [from harmless error] should apply to claims relating to involuntary statements by the defendant." *Id.*

Similarly, Representative Schiff spoke in opposition:

> "The U.S. Supreme Court recently ruled that if a statement by a defendant was admitted in error, that the same rule of law would apply to that error as applies to all other errors; that is, a review would be made to determine whether a new trial had to be ordered or whether evidence was so overwhelming of guilt that there was no reason to order a new trial. *That is the same standard as every other error that I know of.* Now, the point is that the bill sets another standard. The bill chooses a different standard for a new trial than has been determined by the U.S. Supreme Court. "Congressional Record, H 7889, October 16, 1991, 102nd Congress, 1st Session.[25]

The Joint Conference Committee subsequently adopted the proposal to overturn *Arizona v. Fulminate*.[26]

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[25] Emphasis added. Representative Schiff wanted a separate vote on the *Arizona v. Fulminate* issue.

[26] The National District Attorneys Association opposed. See for example speeches in opposition by Representative Hyde, Congressional Record, H 11745, Nov. 26, 1991, 102nd Congress, 1st Session, and Senator Thurmond, Congressional Record, S 18670, November 27, 1991, 102nd Congress, 1st Session. Senator Grassley also opposed the conference report: "The conference report will exclude so-called coerced confessions even if the error is harmless beyond a reasonable doubt to the issue of guilt." Congressional Record, S 18683, Nov. 27, 1991, 102nd Congress, 1st Session. Similarly, Senator Simpson opposed the conference report: "It's harmless error to allow a jury to hear a so-called coerced confession if there is overwhelming additional evidence of guilt." Congressional Record, S 18684, Nov. 27, 1991, 102nd Congress, 1st Session.

The stated rationale was:

"In a consistent line of cases beginning decades ago, the Supreme Court maintained the longstanding proposition that the admission of a coerced confession shall never be a harmless error. See, e.g., *Rose v. Clark*, 478 U.S. 570 (1986); *Chapman v. California*, 386 U.S. 18 (1967); *Haynes v. Washington*, 373 U.S. 503 (1963); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Lyons v. Oklahoma*, 322 U.S. 596 (1944).

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that the harmless error rule can be applied to certain constitutional violations. At the same time, however, the Supreme Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* At that time the Supreme Court recognized only three of these fundamental constitutional errors: denial of the right to counsel, an unbiased judge, and the admission of a coerced confession.

Since Chapman, the Supreme Court has found several additional constitutional violations which are not subject to harmless error analysis. In *Fulminante*, however, the Supreme Court reversed this longstanding principle and, for the first time, applied harmless error analysis to the admission of a coerced confession.

. . . .

The Committee believes that principles of stare decisis, deterrence of police misconduct and fundamental fairness require return to the appropriate rule in effect prior to *Fulminante*. The Committee believe that the admission of a coerced confession, perhaps the most damaging and most inculpatory evidence available to the prosecution, is such a fundamental error that it would be impossible to say that the jury ignored the confession and convicted the defendant on other evidence." Report of the Judiciary Committee of the House of Representatives on H.R. 3371, Rept. 102-242, 102nd Congress, 1st Sess. (pp. 109-110).

Senator Cranston opposed an earlier version of the Omnibus Crime Control Act of 1991 and in particular various provisions for altering habeas to increase the likelihood of actual imposition of the death penalty. He stated, "By adopting these habeas reforms, the proponents have regulated constitutional errors to the realm of mere technicalities, despite the irrevocable nature of such errors. When lives are at stake, Mr. President, how can a constitutional error be a harmless error?. . . . I am guided in my opposition by the belief that constitutional errors are never mere technicalities and that the great writ of habeas corpus is at the cornerstone of our democracy." Congressional Record S 9820, July 11, 1991, 102nd Congress, 1st Session.

The bill did not become law but was reconsidered in 1992.

Representative Newt Gingrich, in extension of his 1992 remarks opposed the conference report's overturning of *Arizona v. Fulminante* stating:

> "Overturning of convictions on the basis of harmless error. Title IV of the conference bill automatically requires reversal of convictions on appeal where the trial court erroneously admitted incriminating statements by the defendant, even if the independent evidence of guilt is overwhelming and it appears beyond a reasonable doubt that the error could not have affected the outcome of the trial." Congressional Record, E 487, March 2, 1992, 102nd Congress, 2nd Session.

Representative Gingrich thus appears to have accepted *Chapman*.

Senator Simpson also opposed the bill as a:

> "[P]rocriminal rights bill hidden behind a huge pile of money – facade" criticizing once again the conference committee proposal which "overrules the harmless error rules that have been applied by the Supreme Court over a number of years. . . . Convicted criminals will be able to use the expanded habeas review process to argue for reversals of sentences and, under the harmless error changes to argue for new trials." Congressional Record, S 2662, March 3, 1992, 102nd Congress, 2nd Session.

Senator Thurmond also spoke against the conference report in language similar to his 1991 arguments:

> "Unbelievably, the partisan report also contains a broad provision which mandates automatic reversal of criminal convictions based on improper admission of a defendant's statement or confession at trial. This new rule applies even in cases where it is shown beyond a reasonable doubt that the error was harmless and could not have affected the outcome of the case. It overturns the Supreme Court case of Arizona versus Fulminante which *correctly* allows the harmless error rule to apply to confessions by criminals." Congressional Record S 2680, March 3, 1992, 102nd Congress, 2nd Session (emphasis added).[27]

Senator Biden viewed the proposal as reflecting the traditional rule barring the use of coerced confessions at trials:

> "[Y]ou can argue the definition of what constitutes a coerced confession and whether it should be allowed under certain circumstances – that is, whether the confession is coerced – but it would allow, if you adopt [the opponents language] someone to take a rubber hose, as I read it, and beat a confession out of somebody. God bless America. They did that during the Inquisition in the 15th

[27] Senator Thurmond listed 70 anticrime measures not contained in the Crime Control Act of 1992 [CCA], one of which is, "preservation of harmless error doctrine. The CCA . . . does not weaken in any manner the existing doctrine that trial error is not grounds for reversing a criminal conviction if the court of appeals determines that it was harmless beyond a reasonable doubt. . . . " Congressional Record, S 2838, March 4, 1992, 102nd Congress, 2nd Session. See also remarks by Senator Thurmond, Congressional Record, S 2821, March 4, 1992, 102nd Congress, 2d Session and Congressional Record, S 3933, March 19, 1992, 102nd Congress, 2d Session; by Senator Gramm, Congressional Record, S 6699, May 14, 1992, 102nd Congress, 2nd Session; and by Senator Hatch, Congressional Record, S 2827, March 4, 1992, 102nd Congress, 2d Session. See also remarks of Justice John Paul Stevens on the bicentennial of The Bill of Rights, remarks introduced by Senator Simon to the Congressional Record, S 3140, March 10, 1992, 102nd Congress, 2d Session. See, also letter by the President of the Fraternal Order of Police, Congressional Record, E 507, March 3, 1992, 102nd Congress, 2d Session.

> century. They did that in England before our Founding Fathers. . . . The Fulminate case says a coerced confession can be found to be harmless error. And the gravamen of that is that as long as there were other ways they would have been able to convict the person and they have that other evidence, they do not throw the case out merely because they may, in the first instance have coerced a confession. Whoa, Mr. President: whoa, . . . This is where somebody coerces a confession. That can mean anything from a rubber hose to saying: I will lock you up in jail forever: no one knows you are here. You cannot call your lawyer . . . We use the basic, old traditional rules. I do not call that a technicality." Congressional Record S 2831-32, March 4, 1992, 102nd Congress, 2d Session.[28]

F. Legislative History: Conclusion

In short, examination of Congressional history since *Chapman* shows several clear instances of Congressional rejection of attempts to curtail the harmless error standard. However, those attempts all failed, because of Congressional resistance by those favoring the maintenance of the vitality of habeas corpus to test State convictions. More recently attempts have been made to reverse the courts decisions perceived as "lowering" the weight of certain categories of errors to "mere harmless error" review. These also have not passed, but floor debate and other materials cited above evidence Congressional acceptance of the harmless error test. Such acceptance spans the political spectrum in attitudes towards the procedural protections for the accused embodied in the Bill of Rights. "Harmless Error" is an accepted baseline for Congressional disputation.

[28] Congressional committee reports of the 1990s reflect general acceptance of the concept of "harmless error" as an appropriate standard. See, House Report on the Comprehensive Crime Control Act of 1990, Rept 101-681, 101st Congress, 2nd Sess., at 132, "To demonstrate 'prejudice,' a petitioner need not establish that the underlying claim, if reached, is meritorious, but only that the alleged error, if proven, is not *harmless*." (emphasis added)

The Seventh Circuit's decision in the instant case enacts by judicial fiat a variant of legislative changes which Congress has been unable to agree upon, but which Congress has in various forms, rejected over the last quarter century. *Chapman v. California* has been ratified by the passage of time. Any change so dramatic as that adopted by the United States Court of Appeals for the Seventh Circuit, should be made by Congress, not by judicial fiat.

III. PSYCHOLOGICAL RESEARCH SUPPORTS THE CONCERNS OF BUSHELL'S CASE

In the last several decades psychologists have explored the means by which people made decisions. Much of this research has focussed upon jury decisionmaking. Such research directly relates to the central question in the case at bar: To what degree can a court in hindsight, determine the impact of non-harmless error upon the jury verdict?

A. Heuristics

Many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, or a defendant's guilt. The factors that go into making a judgment about any of such events are often quite numerous. Individuals use simplifying procedures or strategies to structure their decision process. Psychologists call these strategies "heuristics."[29] For example, if asked to predict how someone would do in a particular job, it is unlikely that each item on a resume will be separately and individually considered. Instead, one is likely to use a simpler procedure, such as considering how similar the applicant is to people who had already succeeded in the job in question. Hogarth, *Judgment and Choice: The psychology of decision*, 5 (1987). Such

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[29] See, Tversky and Kahneman, "Availability: A heuristic for judging frequency and probability," 5 Cognitive Psychology, 207 (1974) Slovic, Fischoff, and Lichtenstein, "Behavioral decision theory," 28 Annual Review of Psychology, 1-39 passim (1977), Hogarth, *Judgment and Choice: The psychology of decision.* (1987), Dawes, *Rational Choice in an uncertain world* (1988)

simplifying strategies are useful, but sometimes lead to severe and systematic errors in judgment.

Research has identified several judgmental heuristics that are directly applicable to the role of a court reviewing the impact of constitutional error upon a jury verdict.

Among the most commonly identified and agreed upon heuristics are: 1) representativeness; 2) availability; and, 3) anchoring and adjustment.

1) *representativeness*: The representativeness heuristic refers to judgments based upon certain things which are presumed to properly "represent" likely future performance or results. For example, one may buy an automobile on the basis of a five minute test drive, or elect a politician on the basis of her ability to campaign. The implicit assumption is that what we see under one set of circumstances is representative of what our experience will be under another, often much wider, set of circumstances. *See,* Rachlin, *Judgment, Decision and Choice,* 59 (1989).

2) *availability*: The availability heuristic involves estimates of frequency or probability by the ease with which instances or associations can be brought to mind. *See,* Kahneman, D. and Tversky, A., "Availability: A heuristic for judging frequency and probability," 5 *Cognitive Psychology,* 207, 208 (1973). For example, people often believe traffic accidents are more likely immediately after they have observed one.

3) *anchoring and adjustment*: "Anchoring and adjustment" is another commonly used heuristic, one highly dependent upon information presented or available to a person. See, Tversky & Kahneman, "Judgment under uncertainty, Heuristics and biases," 185 *Science* 1124 (1974). Predictions are made by reference to available cues. Adjustments are then made. For example, a manager asked to forecast next year's company sales would probably take this year's sales as a starting point, or anchor, and then make adjustments according to anticipated market changes. The dangers of the anchoring and adjustment strategy lie mainly in the way the original anchor is generated. See, Hogarth, *Judgment and Choice: The psychology of decision,* 54 (1987).

Research suggests a court attempting to evaluate the impact of error upon a jury will encounter difficulty with each of these common heuristics. Thus a criminal court judge has a very different set of experiences from the jury upon which to base her "representative heuristic" so as to judge the guilt of today's accused. That judge may have "test driven" many murder or rape trials.

Similarly, a criminal court judge may call to mind as most "available" many instances in which she saw juries reject claims of self defense, while evaluating a self defense or accident claim.

Likewise, a trial or appellate court, after the return of a jury verdict of guilty, is hard put not to use an "anchor and adjust" strategy to determine the impact of error upon the jury decision. Certainly such judicial exercise, is quite different from any exercise the original jury went through.

B. Hindsight Bias and Outcome Bias

Considerable study has also been done of two types of biases, hindsight and outcome biases.[30]

Hindsight bias has been called the,

> " 'Monday morning quarterback' effect, the 'knew it all along' effect, 'creeping determinism,' and 'the curse of knowledge.' Studies of the psychology of hindsight have shown that decision makers tend to underestimate the impact of discovering the outcome of an uncertain event or the truth of an assertion on their perceptions of history. As a result, decision makers exaggerate the degree to which they would have foreseen the 'inevitability' of an outcome. Hindsight bias has been found in a variety of contexts, . . . and even with experienced professionals." Schkade, D.A. and Kilbourne, L.M., "Expectation – Outcome Consistency and Hindsight Bias," 49 *Organizational Behavior and Human Decision Processes,* 105, 106 (1991) (citations omitted).

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[30] These biases may be individual applications of the general heuristics identified above. The anchoring and adjust heuristic may best describe these biases, although selective recall may also be involved. See Schkade, D.A. and Kilbourne, L.M., Expectation-Outcome Consistency and Hindsight Bias, 49 *Organizational Behavior and Human Decision Processes,* 105, 109 (1991).

Hindsight bias has been frequently demonstrated in the jury context.[31]

In a detailed review of most recent hindsight bias empirical research, Hawkins and Hastie caution:

> "In legal decision making, several procedures are justified by the assumption that a judge or juror can undo the effects of extralegal testimony or illegitimate information. Again, research and theory on hindsight phenomena suggest that the decision maker is unlikely to even be aware of the influence of the to-be-disregarded information, much less able to undo its effects. We also found many examples of historical, political, and financial forecasting in which hindsight biases are likely to be involved." Hawkins, S.A. and Hastie, R., "Hindsight: Biased Judgments of Past Events After the Outcomes Are Known," 107 *Psychological Bulletin,* 311, 323 (1990) (For some specific legal judgments examined see *Id.* at 318-19).

"The consistent finding has been that such information appears to have a biasing effect at both the individual and the group level." Casper et al. "Juror Decision Making, Attitudes, and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 308 (1989).

The same inability to ignore has frequently been found. The exact process by which jurors behave is unclear, but Casper et. al suggest: "The hindsight bias offers [an explanation]. . . . It suggests a somewhat different process [from a process of juror reactance against judicial attempts to reduce

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[31] Bodenhausen found clear evidence that hindsight bias produced lower estimates of the likelihood of innocence as contrasted to estimates with no-outcome information and not-guilty outcome information. Bodenhausen, G.V., "Second-Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases," 20 *Journal of Applied Social Psychology,* 1112, 1117 (1990) (subjects 120 psychology students). Casper in a different study concluded that hindsight bias was at work. Casper, J.D., et al, "Juror Decision Making, Attitudes, and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 306 (1989) (subjects 283 psychology students and 253 adults called for jury duty). So did Wasserman, et al., "Hindsight and Causality," 17 *Personality and Social Psychology Bulletin* 30, 33 (1991) (subjects 278 psychology students).

their freedom], one in which the information is integrated into interpretation and recall of testimony in a way that makes it difficult for jurors to ignore information even when they conscientiously try to do so." (*Id.* at 309) Jury interpretation and recall of evidence are both impacted by material they are cautioned not to use. Jury decisionmaking is impacted despite best efforts to obey instructions.

Outcome bias may be a particular variety of hindsight bias, or reflect preferences for or against certain outcomes. Outcome bias may exist when a person is told of the actual outcome of an event, then asked to evaluate the likelihood that such an event will occur on the assumption the outcome is unknown. Baron, J., and Hershey, J.C., "Outcome Bias in Decision Evaluation," 54 *Journal of Personality and Social Psychology* 569, 578 (1988) performed a series of experiments with undergraduate students and consistently found outcome bias demonstrated. This result replicates Fischhoff's who reported, "Finding out that an outcome has occurred increases its perceived likelihood. Judges are, however, unaware of the effect that outcome knowledge has on their perceptions. Thus, judges tend to believe that this relative inevitability was largely apparent in foresight, without the benefit of knowing what happened." Fischhoff, B., "Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty," 1 *Journal of Experimental Psychology: Human Perception and Performance,* 288, 297 (1975).

However, outcome bias studies also examine the impact of preferences for certain outcomes in predicting likely outcomes.

Baron and Hershey suggest:

> "The main practical implication concerns those many cases in which people judge the decisions of others after knowing their outcomes, as occurs in law, regulation, politics, institutions, and everyday life. Our results suggest that people may confuse their evaluations of decisions with the evaluations of the consequences themselves. Mere understanding that such confusion contaminates these evaluations is not enough to eliminate it." Baron, et al., *supra,* 54 *Journal of Personality and Social Psychology,* 569, 578 (1988).

In other words, the attempt by judges after the fact to place themselves in a before the fact position is quite dubious an exercise, an attempt to eliminate facts and biases that empirical research suggests is beyond the ability of most human beings.

C. Confirmation Bias

Another subject of experimental exploration and documentation has been "confirmation bias." The stereotype is an example of confirmation bias. "There is nothing so obdurate to education or to criticism as the stereotype. It stamps itself upon the evidence in the very act of securing the evidence." Lippman, Walter, *Public Opinion,* (Collier-McMillan Canada, Ltd., Toronto, Ontario) p. 65 (1922). Confirmation bias is an example of belief perseveration, the concept that once beliefs are formed and justified, it may take more compelling evidence to change them than it did to create them. Our beliefs influence the manner in which we seek out, interpret and store relevant information. When evidence is processed in the light of these prior beliefs, there is a tendency to perceive more support for those beliefs than actually exists in the evidence in question. The pervasiveness of beliefs in the decision making process has been termed "confirmation bias."[32]

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[32] A judge can unknowingly seek out evidence that supports his position and discredit or ignore evidence that does not. Of course the jury can do the same thing, and repeated studies suggest that juries do just that. "Confirmation bias has long been noted by philosophers of science." Kahneman, Tversky, & Slovic, *Decision Under Uncertainty: Heuristics and Biases,* 149 (1982). Such bias has been identified and documented in various experimental studies. See, Rothbart, M. et al. "Recall for Confirming Events: Memory Processes and the Maintenance of Social Stereotypes," 15 *Journal of Experimental Social Psychology,* 343 (1979) (subjects 164 undergraduate students.); and Bodenhausen, G.V., "Second-Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases," 20 *Journal of Applied Social Psychology,* 1112, 1113-14 (1990) (subjects 120 undergraduate psychology students.) Rothbart et al. conclude the "subjects superior recall of expectancy-confirming events may account for the self perpetuating

(Continued on following page)

However, there is no reason to believe that the beliefs of judges mirror those of the jury. Inevitably, the judge will view evidence in manners different from that of individual jury members.

The stereotype of "homosexuality" may mean something quite different to trial and/or appellate judges, than it does to the jury members. Again as Walter Lippman observed:

> That is why the accounts of returning travellers are often an interesting tale of what the traveller carried abroad with him on his trip. If he carried chiefly his appetite, a zeal for tiled bathrooms, a conviction that the Pullman car is the acme of human comfort, and a belief that it is proper to tip waiters, taxicab drivers and barbers, but under no circumstances station agents and ushers, then his odyssey will be replete with good meals and bad meals, bathing adventures, compartment-train escapades, and voracious demands for money." Lippman, Walter, *Public Opinion, supra* 65 (1922).

For reviewing judges to believe that their scrutiny of a cold record represents any realistic ability to replicate what a jury would do absent material reflecting constitutional error, may itself be little more than confirmation bias reflecting firm belief in the superior intellect of members of the judiciary.

Judges are subject to such bias while making judgments about the quanta and quality of evidence contained in a trial record.

> "[S]uch biased searching, recollection, and assimilation not only bolster one's initial belief, they also produce a pattern of biased evidence that remains highly available to sustain the belief in question when its *initial* basis is attacked or even destroyed. The critical assumption here is that people do not

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character of social stereotypes, and that memory effects were not due solely to the selective retrieval of behavioral events." Rothbart, M., *supra* at 343. Bodenhausen states: "Thus, in criminal cases involving stereotyped offenders, preconceptions about the defendant's social group may color perceptions of his or her culpability *if* they are relevant to the crime in question." Bodenhausen, G.V., *supra* at 1114.

> constantly update or reevaluate the evidence relevant to their beliefs. They do not commonly decide "now that my prior hypotheses has been undermined somewhat I must go back and reassess all of the evidence that I ever considered in the light of that hypotheses." Kahneman, D., et al, *Decision Under Uncertainty, supra,* at 150.[33]

D. The Impact of Such Heuristics on Decision Making

A reviewing court scrutinizes a jury decision after the verdict has been rendered. The jury verdict is known, but hard to ignore. Hindsight bias and outcome bias presumably will have some impact upon any judgment the court makes about the likelihood of impact of evidence[34] and statements whose admission reflect constitutional error.

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[33] Psychologists have begun examining a descriptive model of human decision making called the "story model." That model posits that jurors decide by considering various stories that may describe the events underlying the evidence they have heard. Then, somewhat analogous to "best fit calculations" seeking a differential equation that best describes observed events such as the fall of an object from a skyscraper, jury members decide which story best fits their evaluation of the evidence. See Pennington, N., and Hastie, R., "Explaining the Evidence: Tests of the Story Model for Juror Decision Making," 62 *Journal of Personality and Social Psychology,* 189 (1992) (Experimental subjects 414 undergraduates.); Pennington, N., and Hastie, R., "Evidence Evaluation in Complex Decision Making," 51 *Journal of Personality and Social Psychology,* 242 (1986) (Subjects 26 adult members of a jury pool from Massachusetts). The story model provides a "conceptual model for what jurors are actually doing when asked to decide on a verdict for criminal cases." See, Pennington & Hastie at 253. The story model appears very promising. However, psychology is far from predicting the particular story that will be chosen as the best fit by a particular juror or jury.

[34] One study of the decisions by jurors in real cases concluded that 34 percent of the variance in individual jurors' judgments could be explained by the impact of evidence. Visher, C.A., "Juror Decision Making – The importance of Evidence," 11 *Law and Human Behavior* 1, 11-12 (1987), other factors explained an additional 10 percent of the variance, *Id.*, at 12. (These factors include juror's defendants' and victims' characteristics), leaving 56 percent of the variance unexplained. Visher's results are not atypical. See Casper, J.D., et al., "Juror Decision Making, Attitudes and the Hindsight Bias," 13 *Law and Human Behavior,* 291, 305 and passim (1989).

Moreover, the court will scrutinize the record with its own set of beliefs, reviewing all evidence subject to potential "confirmation" bias.

IV. THIS COURT SHOULD CONTINUE THE TRADITIONAL CHAPMAN STANDARD ON HABEAS REVIEW OF STATE CONVICTIONS

A. The Complex Kotteakos Standard comports with Psychological Research

This court stated in *Kotteakos v. United States,* 328 U.S. 750, 760 (1948), that the harmless error rule of then section 269 of the Judicial Code, 28 U.S.C.A. Section 391, addressed technical errors that "do not really hurt the party whose rights in the trial and in its outcome the technicality affects." If the error is technical the burden was upon the party seeking a new trial to prove its impact. However, "If the error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will, notwithstanding this legislation, rest upon the one who claims under it." *Kotteakos,* 328 U.S. at 760 (citations omitted). This court went on to state, "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . . These judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error." *Id.* at 763-4 (citations omitted)

The reviewing court must consider:

> "[T]he question . . . not were they [the jury] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
>
> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge other's reactions not by his own, but with

> allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.
>
> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. the inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* at 764-65. (citations omitted)

Although *Kotteakos* neither employed terms such as heuristics, nor hindsight bias, the opinion reflected understanding of the complex nature of the exercise at hand. The court reversed and remanded.

The opinion of the United States Court of Appeals for the Seventh Circuit cites as reasons for adopting a narrow standard of review in habeas attack problems of delay, accuracy and cost. (Seventh Circuit Opinion, Jt. App. 120-22) However, *Kotteakos* asserted, as has frequently been asserted, "But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth." *Kotteakos,* 328 U.S. at 773.

B. The Antiquity of the Writ of Habeas Corpus is Matched by its Importance as an Immediate Remedy to Try the Ability to Detain a Person[35]

Chief Justice Marshall considered in *Ex parte Bollman and Swartwout*, 8 U.S. 75 (1807) whether the writ of habeas corpus properly lay against judicial commitment. Chief Justice Marshall's response finding the writ proper against judicial commitment was short and direct, "Against this objection the argument from the bar has been so conclusive that nothing can be added to it." *Id.* at 100.

That argument for Bollman by Robert Goodloe Harper,[36] about inferior federal courts is just as applicable to state courts:

> "Before such a principle is admitted, let us inquire into its possible and even probable effects on the liberties of the people. Is it not manifest that it would deprive the citizens of the guardianship of the most respectable and independent courts, and place their personal liberty at the mercy of inferior tribunals? Do we not know that Congress may institute as many inferior tribunals, and may assign to the judges of these tribunals such salaries as they may think fit? Does it not hence result that a succession of courts may be instituted, to the lowest of which may be assigned salaries so contemptible and duties so unimportant or so odious, as necessarily

[35] For example, the statute of 31 Car. 2, c. 2, 27 May 1679, provided that the return to the writ shall be made "within three days after the service thereof" unless the distance to the court is between 20 and 100 miles, in which case ten days is allowed, or if greater than 100 miles, then 20 days. (Section II) Failure to comply made the keeper of the prisoner liable to forfeit to the prisoner 100 pounds for the first offense and for the second offense 200 pounds as well as loss of the keeper's office. (Section V). See, Blackstone, 3 *Commentaries on the Laws of England*, 129-137 (1768).

[36] Harper had been the principle drafter of the 1801 Judiciary Act, 2 Stat. 89, which produced the midnight judges controversy that led to *Marbury v. Madison*. 5 U.S. 137 (1803) See, Haskins and Johnson, II, *Foundations of Power: John Marshall, 1801-15, History of the Supreme Court of the United States* (Devise History) 123-26 (1981).

> and certainly to exclude every man of character, talent and respectability of every party? Will not such courts, therefore, be necessarily filled by the meanest retainers, the most obsequious flatterers, and the most servile tools of those in power for the moment? Can anything like independence or integrity be expected from such judges? Will they not act continually under the influence, not merely of their own party passions and prejudices, but of hope and of fear, those great preverters of the human mind? The precedent is already set that they may be turned out of office by the abolition of their courts; and their hopes of promotion to a higher station, and a better salary will depend on their servility and blind obedience to those in power. Let it be once established by the authority of this court, that a commitment on record by such a tribunal, is to stop the course of the writ of habeas corpus, is to shut the mouth of the Supreme Court, and see how ready, how terrible, and how irresistible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. We unfortunately know, from the experience of every age, that there are few excesses into which men may not be hurried by the lust of power or the thirst of vengeance." *Ex Parte Bollman*, 8 U.S. at 89-90.

Such concerns are at the heart of the constitutional system of checks and balances, of Article III courts, and the complex federal system. The impartiality of state courts is not something that ranks as a constitutional assumption; indeed, quite the opposite.[37] When state judges are elected, as they

[37] The concerns of *Bushell's Case* are as central today as they were centuries ago to understanding and appreciating the importance of the criminal trial jury. This court sits, unlike British courts, under a written constitution which includes textural recognition of both federal preeminence, Article VI, Cl. 2 (Supremacy Clause); and concern with potentially biased state courts, Article II, Section 2, cl. 1 (diversity jurisdiction) Section 2254 is but one means of implementing the concern of the drafters of the Constitution and its amendments

(Continued on following page)

often are (as are Wisconsin Supreme Court justices, Wisconsin Constitution, Art. 7, Section 4) the assumption of impartial judicial action may be more suspect – particularly as against "thirst of vengeance or lust of power." When the case involves a victim, as in the instant case, who was the District Attorney of Buffalo County, Wisconsin, that suspicion is heightened. A special prosecutor for the county may be under considerable political and professional pressure to ensure a conviction. The temptation to take short cuts with constitutional protections may be very real. Elected state judges are also subject to political pressure. That the Court of Appeals of Wisconsin reversed the conviction in Mr. Brecht's case (Jt. App. 38) may illustrate that not all state judges are so impacted; however, this court's ruling regarding section 2254 will apply in many and varied situations.

It is particularly appropriate to place the burden upon the states to demonstrate the harmlessness of constitutional error occasioned by prosecutorial misconduct. See, *Note, Harmless Error, Prosecutorial Misconduct and Due Process: There's More to Due Process than the Bottom Line*, 88 Colum. L. Rev. 1208 (1988). Such assignment of the burden is appropriate in that each of the policy reasons supporting *Strickland v. Washington*, 466 U.S. 668, 693 (1984) is absent (i.e. the government was not responsible for and thus unable to prevent ineffective assistance by defense counsel). Moreover, the ordinary burden of proof rules place such burdens upon the state in criminal law cases (constitutionalized by *In Re Winship* 397 U.S. 358 (1970)), and the common law policy customarily assigns the duty to demonstrate impact upon the outcome upon the party who benefitted from the error. *Note, Harmless Error*, 88 Colum. L. Rev. at 1318-1320.

(Continued from previous page)

to secure federal constitutional guarantees in the states. Congress early on enacted legislation that implemented the Constitution's vision of the proper relationship of federal and state courts. See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Cohens v. Virginia*, 19 U.S. 264 (1821); See also sections 13 and 14 of the Judiciary Act of 1789.

C. This Court's Role in Maintaining the Writ of Habeas Corpus

The connection between habeas corpus and fundamental liberties has long, deep roots.[38]

> "[S]uch great liberties as worship and speech will go on somehow, despite laws, but not liberty of the person. Censorship can be evaded; prosecutions against ideas may break down; a prison wall is *there*. Only habeas corpus can penetrate it. When imprisonment is possible without explanation or redress, every form of liberty is impaired. A man in jail cannot go to church or discuss or publish or assemble or enjoy property or go to the polls." Chaffee, Vol. II, *Documents on Fundamental Human Rights*, at p. 1 (Athenium, New York, 1963 ed.)

It is thus important that the writ of liberty remain viable, and so long as Congress fails to amend section 2254, that the writ run to test the validity of state court convictions.

However, the decision by the United States Court of Appeals for the Seventh Circuit *de facto* shifts the burden of proof regarding the error from the state to Mr. Brecht. See Seventh Circuit Opinion, Jt. App. 127-128. That opinion

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[38] William Penn wrote of the treatment of the jurors in *Bushell's Case*:

"That the late proceeding of the Court, at the Old Baily, is an evidence Demonstration, that Iuries are now but *meer Formality*, and that the partial charge of the Bench must be the Verdict of the Iury; for if ever a Rape were attempted on the Conscience of any Iury, it was there. And indeed the ignorance of Iurors, of their authority by Law, is the only Reason of their unhappy cringing to the Court, and being scared into an *Anti-Conscience Verdict*, by their lawless threats.

But we have lived to an Age, so deboid from all humanity and reason, as well as Faith and Religion, that some stick not to turn *Butcher to their own Privileges, and Conspirators against their own Liberties*. For however *Magna Charta* had once the reputation of a sacred unalterable Law . . . yet it is frequently objected now, that the benefits there designed *are but temporary*, and therefore lyable to alteration, as other Statutes are." William Penn, *The Peoples Antient and Just Liberties Asserted in the Tryal of William Penn and William Mead* 47 (1670).

ignores representations at oral argument that under any standard short of complete deference to the last state court decision, Mr. Brecht was still entitled to the grant of the writ of habeas corpus. Petition for Rehearing and Suggestion for Rehearing en banc, Jt. App. 135.[39]

Mr. Brecht's accident justification and the presence or absence of intent to kill was by no means demonstrated by the record in this case. Many pieces of evidence are credible and undisputed that tend to refute guilt on the murder charge. Such evidence includes Brecht's flight with little more than a dollar in his pocket and with no weapon, Tr. at 360-61; the auto accident which involved skidding on loose gravel, Tr. at 318; the bullet jammed perpendicularly into the gun left outside the house, Tr. at 264, 591; all tend to demonstrate a panic reaction and tend against inferences of premeditation. The essence of the matter in dispute, and the only matter in dispute, was the drawing of such inferences, inferences for or against Mr. Brecht's intent to kill. Yet the drawing of such inferences is at the heart of the historic jury function. See *Bushell's Case* 124 Eng. Rep. 1006 (1670).

The Seventh Circuit discusses the application of its new standard in a few short pages. That discussion ignores the central position of Mr. Brecht's credibility in the case upon the only item at question, intent to kill. See, Jt. App. 137. The opinion fails to mention the statement by Mr. Hartmann in response to a question after the shooting, "Did he [Todd Brecht] have something against you? *Answer, I don't know.*" Tr. at 164, 175.[40]

The standard adopted by the Seventh Circuit in this case, proposes the substitution of another difficult standard, one

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[39] See also, Petitioner-Appellee's Brief in the United States Court of Appeals for the Seventh Circuit, at 29.

[40] The various, factual inaccuracies contained in the opinion by the Seventh Circuit, some of which were listed in the Petition for Rehearing and Suggestion for Rehearing En Banc, Jt. App. 138 – 141, illustrate the danger of an appellate court attempting to put itself in the position of the trial jury. The appellate court very clearly went awry in this case, perhaps in its "burning interest" in a certain subject. Jt. App. 128 (J. Cudahy, concurring).

developed by this court for cases of direct appeal of federal convictions. However, while sitting over a direct appeal of a federal conviction this court exercises different authority than on collateral review under 28 U.S.C. section 2254. While sitting on collateral review of state convictions this court lacks supervisory authority. Instead, it acts as a constitutional court, a function that in one sense limits the scope of this court's functions, but in another emphasizes the fundamental importance of the power exercised.

With the virtual elimination of all mandatory direct appeal routes to this court, there exist few if any criminal convictions that this court must review as a matter of right. Instead, this court exercises certiorari discretion to scrutinize cases it wishes to hear. This court cannot review the merits in more than a handful of criminal cases. So long as this court continues to employ a "harmless error" standard of review on direct review of constitutional error, continuation with the same standard on habeas review, permits lower federal courts to perform important screening functions to eliminate the many cases in which claimed error is either not error, or if error not constitutional error, or harmless. With such screening provided by lower federal courts on collateral attack, this court can have confidence that cases such as *Giddeon v. Wainwright,* 372 U.S. 335 (1967) will be identified by some federal court.

Issues of whether it is improper to permit review after "delay, often extended," Seventh Circuit Opinion Jt. App. 120; or after, "opportunities for new errors" "at a new trial" Jt. App. 121; or whether, "high costs of ordering retrials many years after the events, may incline [federal courts] to dilute the standard of harmlessness," Jt.App. 121; are appropriately either for Congress to address, or else within this Court's power to address should new error occur. Indeed, relaxing federal scrutiny at the "harmless error" level, is unlikely to encourage state courts on direct review to scrutinize with particular care; rather they are more likely to "relax their own vigilance." Seventh Circuit Opinion, Jt. App. 122. State judges are far more likely to expect scrutiny from local federal district judges than from this court on certiorari.

D. A New Standard is Not Appropriate Since it Could Generate Substantial New Burdens for Federal Courts

Moreover, the "harmless error" standard is difficult enough for courts, state and federal to apply; importing yet a new standard into collateral habeas attack would only further complicate the matter. Indeed, instead of reducing the need for scrutiny, as the Seventh Circuit appears to believe, the standard requires the federal courts to engage in a complicated balancing test that must be accomplished by weighing the entire record in every single case. While this may be an obligation of a court on direct review, it is by no means necessitated by the practical reality of collateral review on habeas. Yet application of the *Kotteakos* standard on habeas would require the district judges become masters of such state trial records. Effective review would require the records be fully mastered. Rare filing of extensive state trial records may become the norm, increasing the burden on federal courts.

It is already apparent that the harmless error standard is difficult enough to apply. Many different versions of that facially simple standard have been detected. Field identified three different meanings of harmless error:

> 1. The first approach focuses upon the erroneously admitted evidence (or other constitutional error) to ask whether it might have contributed to a guilty verdict.
>
> 2. The second approach asks whether, once erroneously admitted evidence is excluded, there remains overwhelming evidence to support the jury's verdict.
>
> 3. The Third approach asks whether the tainted evidence is merely cumulative – that is, merely duplicative of some remaining admissible evidence. Field, *Assessing the Harmlessness of Federal Constitutional Error – A Process in Need of a Rationale,* 125 Yale L.J. 15, 16 (1976).

Field found examples of each approach. *Id.* Such confusion surrounding the meaning of the harmless error standard

has frequently been identified. See, Stacy and Dayton, *Rethinking Harmless Constitutional Error,* 88 Colum. L. Rev., 79, at 81-82, nn. 13, 14. That understanding is further complicated by the need to understand the difference between "structural errors" and "trial errors" identified by this court in *Arizona v. Fulminante.* In the context of the case at bar, for example, although the constitutional error might be classified as trial error, the error was so fundamental to the structure of the case described by the special prosecutor at closing argument that it ought to be classified as structural error.

How can a reviewing court, state or federal, consider the impact of constitutional errors violating the Miranda right to silence, when those errors are so central to the prosecution's theory of the case? Once a court determines it cannot exclude the possibility of harm, when that possible harm runs to the core of the prosecution's theory, valuing the level of that harm is as fruitful as debating the number of angels that can fit on the head of a pin.[41]

Psychology research suggests this is an incredibly difficult task, perhaps beyond current human predictive powers. More particularly, there is, "[S]trong evidence demonstrating that appellate judges cannot and do not accurately gauge the impact that particular evidence had or would have had upon a particular jury that convicted the defendant."[42]

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[41] Compare, *Wainwright v. Greenfield,* 474 U.S. 284 (1986) (silence as related to sanity issue); See also concurring opinion by Chief Justice Rehnquist at 474 U.S. 301, "a minute extract" from the prosecutor's closing argument can be deemed harmless – quite a different situation from that at bar.

[42] Stacy & Dayton, *Rethinking Harmless Error,* 88 Colum. L. Rev. 79, 129, n 186 (1988), referring to Teitelbaum, Sutton-Barbere and Johnson, *Impact of Improper Evidence Upon Juries,* 1983 Wis. L. Rev. 1147. Teitelbaum reports substantial disagreement as to the importance of improper testimony regarding the defendant's refusal to speak to a police officer after an accident; disagreement not only among laypersons but also reflected among lawyers (who Teitelbaum considered surrogates for judges). See Teitelbaum, *supra* at 1200-1201, Appendix 2, Tables 1 & 2, item 8, q. 14 at 1183, and 1164. Teitelbaum considered the data demonstrated wide disparity among layperons, significant lack of agreement among lawyers, and concluded, "For reviewing courts to conclude that a given item of proof, or a given argument did, or did not carry balance tilting weight with a particular jury appears, therefore, to be a most speculative enterprise." *Id.* at 1183.

E. Chapman Promotes Both Truth Finding and Public Respect for Justice

The harmless error rule serves two functions, recognized by this court in *Arizona v. Fulminante*, 113 L.Ed.2d at 330:

> "In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless error doctrine is essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' "

Those functions means that full vitality should continue to be accorded harmless error review for all state habeas cases. Congress assumes the harmless error standard not only to be the current standard, but also the appropriate standard.[43]

Moreover, examination of the legislative history detailed above as well as this court's decisions from *Kotteakos* through *Arizona v. Fulminante* reflects a consensus for the greater part of this century that constitutional error is different from other sorts of error.

Issues of factual accuracy abound in any application of *Miranda* rules, whether on collateral or direct attack. The

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[43] Indeed, as indicated above, certain members of Congress firmly believe that *Fulminante* errors can never be considered harmless and require retrial. The only authority cited for the silence of Congress in the opinion by the Seventh Circuit is a 1990 article, predating all of the Congressional reaction to this court's *Arizona v. Fulminante* decision. Part III C of the opinion, Jt. App. 123. That portion of the article cited omits any examination of the Congressional treatment of *Chapman*. (indeed, there is scant support if any cited for the authors opinions) but argues for the power in this court to innovate about habeas corpus until Congress restricts that power. Jeffries and Stunt, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U.Chi.L.Rev. 679, 709 (1990) Such argument ignores centuries of habeas corpus law, and more particularly the quarter of a century of experience by state and federal courts applying the *Chapman* standard. Part III C of the opinion by the Seventh Circuit fails as well to mention *Wainwright v. Greenfield*, 474 U.S. 284 (1986) as another example of this court employing the *Chapman* standard on collateral attack. Jt. App. 125-6.

court in *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990) disagreed with Judge Easterbrook that *Doyle* is a "prophylactic" rule. Instead the rule was, "at its heart, concerned with the ability of the adversarial system to find the truth." 909 F.2d at 305 n.14.

Deterrence of prosecutorial misconduct is, however, not an unimportant factor. Comments on silence, comments on what could have been but was not said, are powerful tools.

In cases covered by *Stone v. Powell*, 428 U.S. 465 (1976) the "truth" of improperly admitted physical evidence is in no way impeached by improper admission. However, "truth" bears a central relationship to the values underlying the mandates of *Miranda*. See, Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 Colum. L.Rev. 1369 (1991) Constitutional error in admitting *Miranda* precluded testimony goes straight to the guilt or innocence of the defendant, directly to the heart of the conviction.

The standard of review, which in the harmless error instance, incorporates the heavy burden of proof placed upon the state, is most important in close factual cases.[44]

The instant case is a close case on the facts, closeness which can be measured objectively by the fact that every reviewing court has reversed the result of the court preceding it, or subjectively by the facts and arguments at trial. When the victim himself stated that he did not know why the shooting occurred, it was for the jury, not a judge, to determine whether Mr. Brecht's accident defense was true or not.

As this court stated in *Doyle v. Ohio*, 426 U.S. 610, at 617 (1976), "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested."[45]

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[44] What is particularly perplexing, is that Mr. Brecht's testimony at trial, so depreciated by the special prosecutor's closing arguments, was in essence contained in the opening statement by Brecht's trial counsel. Jt. App. 6-10.

[45] The opinion by the Seventh Circuit cites *Raffel v. United States*, 271 U.S. 494 (1926) at part III A, Jt. App. 109, a decision whose vitality at least in federal courts has been questioned, *Jenkins v. Anderson*, 447 U.S. 231 (1980) (concurring opinion by Justice Stephens joined by Justice Stewart at 241 n.2)

In Mr. Brecht's case, the fact that Brecht intimated during the process of being arrested that he wanted to talk to detectives, Jt. App. 36, may have made his subsequent failure to talk from his arrest until trial significant. That promise, along with its apparent breach as emphasized by the special prosecutor's argument, may have been what moved many, or none of the jurors to convict Mr. Brecht. Only those jurors can ever know the weight of this inference. Yet this inference is but one of many inferences from undisputed testimony the jury could draw. The importance of possible inferences that may be drawn from silence moved the Pennsylvania Supreme Court to hold under its state constitution that failure to give a "no adverse inference" charge to the jury *can never amount to harmless error. Commonwealth v. Lewis*, 589 A.2d 975, 981 (Pa. 1991) (see also cases cited from sister states at n.10, at 980). However, no adverse inference charge was given to Brecht's jury.

Mr. Brecht's case is comparable to that held *not* to constitute harmless error in *Satterwhite v. Texas*, 486 U.S. 249 (1988) (prediction of future dangerousness in the sentencing phase of a trial given by a psychologist – the constitutional error was a 6th amendment violation of the right to counsel). In *Satterwhite*, this court stated:

> "In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its narrow task of assessing the likelihood that the error materially affected the deliberation of the jury." 486 U.S. at 256, citing *Holloway v. Arkansas*, 435 U.S. 475 at 490-91 (1978) The question there, as here, "[I]s not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." 486 U.S. at 258-59.

Just as Dr. Grigson's testimony was central to the state's case and devastating to the accused in *Satterwhite*, comments on

Brecht's silence were central to the state's case and just as devastating to Mr. Brecht's defense.

The *Chapman* standard should not be tampered with on habeas. As Judge Cudahy's concurring opinion illustrates, until the Brecht decision it was clear in the Seventh Circuit that the harmless error standard applied to review of state convictions. Jt. App. 128-29. The United States Court of Appeals for the Eighth Circuit also understands *Chapman* applies. *Bass v. Nix*, 909 F.2d 297 (8th Cir. 1990); *Clark v. Wood*, 823 F.2d 1241 (8th Cir. 1987); *United States v. Disbrow*, 768 F.2d 976 (8th Cir. 1985), *Miller v. Greer*, 789 F.2d 438, 443 (7th Cir. 1986) (harmless error standard applied by all Circuits, fn. 14, rev'd on other grounds 435 U.S. 756 (1987)).

Moreover, this court applied *Chapman* in cases beyond those listed in Part III C of the Seventh Circuit's opinion. Jt. App. 125-26. For example, see, *Moore v. Illinois* 434 U.S. 220 (1976); and *Milton v. Wainwright*, 407 U.S. 371 (1972). Thus the issue should not have been treated as an open question.[46]

F. The Proper Chapman Test is Material Impact upon Jury Deliberation

The understanding of the test articulated by *Satterwhite* should be reemphasized as the appropriate understanding, i.e. that constitutional error may have materially affected the jury's deliberation, 485 U.S. at 256, and that the error did not contribute to the verdict of the jury. 485 U.S. at 258-59. The burden to prove this should rest upon the state.

Understanding the harmless error standard in this way is consistent with psychological research demonstrating the complexity of the decision process of the jury. Such understanding is also consistent with tradition, and the understanding of Congress, both now and at the launching of "harmless error" tests in the early part of this century.

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[46] For the unusual way in which the issue arose and was dealt with in the court below, see, Petition for Rehearing with Suggestion for Rehearing En Banc, Jt. App. 134-136.

Applying the harmless error test, which is just what the Untied States District Court for the Western District of Wisconsin did, results in the necessity of granting the writ of habeas corpus, and letting the state retry Mr. Brecht if it wishes.

CONCLUSION

Wherefore, petitioner prays for reversal of the judgment below and reinstatement of the order of the United States District Court for the Western District of Wisconsin of March 14, 1991 granting the writ.

Respectfully Submitted,

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